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ABSTRACT

The Federal Communications Commission (FCC) is empowered with a delicate balance of executive, legislative, and judicial powers, putting the Commission in a vulnerable position whenever its decisions are reviewed. This paper takes the position that a "super-regulatory" title is unjustified when applied to the legally sanctioned role assumed by the United States Court of Appeals for the District of Columbia, the court that reviews the FCC's decisions. In support of that position, the paper reviews the origin, growth, and current status of the relationship between the FCC and the Court of Appeals, provides arguments supporting judicial prescription of telecommunication policy, and analyzes suggestions for restructuring the administrative/judicial apparatus for communication regulation. The vague "public interest" mandate wielded by the FCC is noted as the source of the FCC's vulnerability; however it is concluded that the Court of Appeals, rather than taking advantage of that vulnerability, has insured that every interpretation of "public interest" be carefully considered. In this way, reasonable, if not expert, judgment prevails in communications policymaking decisions. (RL)

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BROADCASTING AND THE U.S. COURT OF APPEALS:

TELECOMMUNICATION POLICY BY JUDICIAL DECREE ?

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The statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution.[1]

Louis L. Jaffe
Harvard Law Review

BROADCASTING AND THE U.S. COURT OF APPEALS:

TELECOMMUNICATION POLICY BY JUDICIAL DECREE ?

The Communications Act states that decisions and orders of the Federal Communications Commission may be appealed to the United States Court of Appeals for the District of Columbia (hereinafter the Court or the Court of Appeals). The statute adds that the judgment of the Court of Appeals is final, subject only to review by the U.S. Supreme Court upon writ of certiorari.[2] The simplicity of this statutory appeals mechanism belies the magnitude of influence the Court has attained in affecting Commission policymaking decisions. Reversals of major FCC decisions in recent years have occurred with more frequency and have resulted in greater impact upon the broadcasting industry than ever before. To the extent that Court of Appeals reversals have often been interpreted as supplanting administrative policy with judicial policy, the Court has been labeled by some as a "super-regulatory agency" whose judges are "the men with the muscle in broadcast law."[3]

This study takes the position that the "super-regulatory" title is unjustified when applied to the legally sanctioned role assumed by the Court of Appeals in reviewing decisions of the FCC. The Court's review role in FCC policymaking will be examined here by analyzing: 1) the origin, growth and current status of the administrative/judicial relationship of the FCC and the Court of Appeals; 2) arguments supporting judicial prescription of telecommunication policy; and 3) suggestions on re-structuring the administrative/judicial apparatus to better clarify the relationship between the FCC and the Court of Appeals.

FCC and the Court of Appeals, 1927 to the Present

Broadcasting magazine, in April, 1977, noted the following in an editorial entitled "Who's in charge here?":

> In the past month the FCC has suffered one humiliating defeat after another in the U.S. Court of Appeals for the District of Columbia. The agency's carefully considered rules on crossownerships of co-located newspapers and broadcast stations have been overturned. The FCC has lost the test case it hand picked to define indecent broadcasts. Its rules against the siphoning of broadcast programming by pay cable have been declared illegal, and it has been upbraided for violating its own ex parte rules. No legal training is necessary to detect that something is haywire in Washington.[4]

The alarming tone of the editorial is not unique to a publication known for its somewhat biased representation of the broadcasting industry. Broadcasting has on several occasions accused the Court of Appeals of "second-guessing" the FCC to the point of usurping the Commission's regulatory role.[5] There is certainly the opposite point-of-view on the issue, the one which contends that the Court of Appeals has acted entirely within its delegated powers of judicial review in its decisions to reverse the FCC. Just what those powers of judicial review are, how they have evolved and how the Court of Appeals currently functions and defines its role in the regulatory process are the subject areas to be examined in the first part of this paper.

The FCC, like other regulatory or administrative agencies, "affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting."[6] Decisions resulting from the quasi-legislative, quasi-executive, quasi-judicial functions of the Commission are reviewable by the Court of Appeals under statutory requirements that will be noted shortly. The Court's boundary or scope of judicial review has also been established by a 1946 statute, the Administrative Procedure Act, which provides in part that the reviewing court shall

> hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
> (D) without observance of procedure required by law; . . .[7]

Former FCC General Counsel Henry Geller has paraphrased the above to mean that the review function of the Court of Appeals

> is to ensure that the FCC has acted lawfully--that it has complied with the provisions of the Communications Act . . . , has set forth rational grounds for its actions, and has made findings supported by substantial evidence in the record viewed as a whole.[8]

Whether or not the Court of Appeals has remained within the well-defined parameters of judicial review is really the core of the matter that this paper must eventually examine. Requisite to that, however, is a brief glimpse of the administrative-judicial relationship that has evolved between the FCC and the Court of Appeals since 1927.

The Communications Act, under whose provisions the American broadcasting industry has been regulated since 1934, was preceded by the Radio Act of 1927. The Radio Act first stipulated the role of the Court of Appeals in its judicial review of Federal Radio Commission (predecessor of the FCC) decisions. Section 16 of the statute reads:

> Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority [the FRC] shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia . . . .[9]

Section 16 goes on to include the Court's scope of review:

> At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just.[10] (emphasis added)

Criticism of such a broadly based scope of review was not long in coming. One attorney, commenting on the first decision rendered on review by the Court of Appeals under the provisions of the Radio Act (Federal Radio Commission vs. General Electric Company, hereinafter the WGY case or decision), argued that it was

> manifestly unsound to establish a court of law as a super-radio commission, empowered to review the record of the commission in an equity sense, to take additional evidence, and to make further findings without reference to the findings or decision of the commission.[11]

The WGY case resulted from the FRC's refusal to allow radio station WGY to transmit after sunset. The reversal of the FRC by the Court of Appeals led the Commission to seek a review of the Court's decision by the U.S. Supreme Court. The Supreme Court declined to grant the FRC certiorari, however, stating instead that the Radio Act's "provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field." Essentially, this unique interpretation of the role of the judiciary said that the "Court of Appeals was a part of the machinery of the Radio Commission for administrative purposes," and that, as such, the Supreme Court was "precluded from exercising its jurisdiction on decisions which call for the exercise of essentially legislative or administrative functions." The decision also reflected the Supreme Court's adherence to the common law concept that "administrative action was usually unreviewable in absence of legislative intent in favor of review."[12]

The Radio Act was amended in 1930 to include the same language that would become Section 406 of the Communications Act, thus insuring the ultimate judicial review of FRC decisions by the Supreme Court.[13] The amendment did nothing, however,

to alter the legal pronouncement by the Supreme Court in its refusal to hear the WGY case that the Court of Appeals and the Federal Radio Commission were to work cooperatively in establishing a basic regulatory structure for the broadcasting industry and that the Court of Appeals could indeed impose its will on that of the Commission whenever the views of the two came into conflict. The consequence of this Supreme Court decreed functional relationship has been documented by LeDuc and McCain:

> During the FRC era, from 1927 through 1934, the federal courts decided 60 controversies involving the Commission, 41 of which contested its basic power to regulate broadcasting. These judicial decisions were profoundly significant not only in determining the immediate regulatory role of the FRC, but also the scope and shape of future government-broadcaster control. Vague language of the Radio Act of 1927 required judicial definition. This initial judicial definition became precedent, governing all future interpretation of the statute unless expressly overruled.[14]

The joint regulatory alliance of the FRC-Court of Appeals has characterized many administrative agencies at a similar stage of development,[15] but the FRC was a unique case due to the uncertainty of its tenure. The enabling Radio Act that created the Commission had never planned for it to be a permanent administrative body. Instead, the Commission was to have full regulatory authority for only one year, at the end of which all its authority was to be vested in the Secretary of Commerce. The FRC would still exist at the end of the year but only as an advisory body to the Commerce Secretary. As it happened, the FRC retained its authority until 1934, since Congress periodically extended the one year limitation allowing the Commission to exercise its original regulatory power.[16]

The tenuous position of a federal body to regulate the broadcasting industry changed with the 1934 passage of the Communications Act. The Federal Communications Commission replaced the FRC and was given broad discretionary powers to "perform any and all acts, make such rules and regulations, and issue such orders, . . . as may

be necessary in the execution of its functions"[17] and to regulate the broadcasting industry in the "public interest, convenience and necessity."[18]

A body such as the FCC with a more clearly defined statutory mandate obviously required a similarly well-defined scope of judicial review to guide the Court of Appeals in reviewing Commission decisions. For this reason as well as to assure that the FCC and all other administrative agencies objectively and fairly applied "statutory provisions to private interests," the Administrative Procedure Act was passed.[19] By limiting the scope of review, however, the APA failed to diminish the attitude nurtured throughout the FRC period that the relationship between the Court of Appeals and the FCC should be one of cooperation. The Court articulated its opinion in a 1970 decision:

> The [review] process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.' The court is in a real sense part of the total administrative process, . . .[20]

Before proceeding to the next part of this paper a brief examination of the structure and procedure of the Court of Appeals would be in order. The U.S. Court of Appeals, District of Columbia Circuit, is but one of eleven appeals courts in the United States.[21] This paper deals exclusively with the D.C. Circuit because it is the single circuit empowered by statute to review FCC decisions as well as decisions by other administrative bodies. Judges sitting on the Court of Appeals are appointed by the President of the United States with the advice and consent of the Senate. The judges normally hear appeals while sitting in panels of three, though nine judges are appointed to serve in each appeals circuit. Cases of particular significance may sometimes require that all nine judges of a single circuit sit "en banc" on the same panel.[22] The fact that most Court of Appeals decisions are products of a three judge panel often causes inconsistencies in the

manner in which different panels of the same circuit react to similar issues.

Scope of Judicial Review: Proper or Excessive Application?

The statutory bases of judicial review as well as the developing interrelation of Court of Appeals and administrative agencies, particularly the FCC, engendered by the review process have served to introduce the second part of this paper. An examination of the more general application of the APA scope of judicial review will now follow together with interpretative views from various individuals as to whether or not the Court of Appeals' review practices have exceeded their designated scope.

Now that the statutory privilege of judicial review and the narrow limits of review have been defined we might inquire as to the necessity of judicial review in the first place. Kramer provides the following answer:

> The existence of judicial review is a constant reminder to the official that excessive actions risk judicial inquiry and reversal. It is a constant source of assurance and security to the individual citizen that he has this method of vindicating his rights against the state before an independent tribunal. Moreover, it is, if properly limited and exercised . . . , an actual source of strength to the administrative process. Public confidence in government is increased, and courts are allowed to contribute their special talents to the administrative process in such areas as constitutional issues, statutory interpretations, establishment of procedural standards for fair play and due process, and determinations that administrative findings are supported by substantial evidence.[23]

Paper elaborates on the generalized role of judicial review by applying those review standards enunciated by Kramer directly to Court of Appeals review of the FCC:

> To withstand the scrutiny of judicial review, . . . a decision or regulation of the FCC, like that of any other administrative agency, must demonstrate that it is made pursuant to delegated authority and that there is sufficient evidence in the record to show that the decision was rational. The agency's failure to justify its decision, however, does not necessarily authorize the reviewing court to make those regulatory decisions which fall within the agency's jurisdiction. Instead, the reviewing court's remedy for unlawful administrative action is almost always a remand of the case to the agency, directing the agency to correct the deficiencies of its decision.[24]

The two chief criteria for reviewing the FCC, then are 1) the determination of delegated authority to act and 2) the rationality of the action once it has occurred. Recalling the criteria for judicial review established by the Administrative Procedure Act, it should be obvious that the "delegated authority" and "rationality of action" criteria simply encompass those more narrowly defined APA criteria.

The statutory discretion bestowed upon the FCC is quite broad. As this paper has stated previously, the Communications Act of 1934 authorizes the Commission to regulate the broadcasting industry in the "public interest, convenience and necessity." This "statutory grant of power" is exercised "in the context of rule making or the application of rules or general principles to a specific set of facts."[25] In both cases the FCC has a broad "discretion to resolve factual questions and to shape the law within the broad constraints of the [Communications Act] ."[26] The court's responsibility in this context, as defined by the U.S. Supreme Court, is "to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear . . . in the public interest."[27]

The rationale of an FCC decision is generally determined by the "'substantial evidence' test based on the 'record as a whole.'" Paper defines the "substantial evidence" test as

> grounded in the overriding principle that the [administrative] agency has the exclusive power to determine fact, while the role of the reviewing court is limited to ensuring that the findings of fact made by an agency in a given case are 'adequately supported' by the record before the court.[28]

Again, the court--this time the Court of Appeals--has defined its role in the context of reviewing the "substantial evidence" criterion of administrative agency decisions:

> Its supervisory function calls on the court to intervene . . . if the

> court becomes aware, especially from a combination of danger signals, that the agency has not taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint even though the court would on its own account have made different findings or adopted different standards.[29]

Several legal scholars have made extensive studies of Court of Appeals decisions and their effect on the FCC. Their conclusions have generally supported the thesis that the Court has restricted itself to reversing the Commission primarily in cases where "delegated authority" or "rationality of action" were the key issues to be resolved. In one study Paper analyzed the Court's reversal of the FCC from 1958 to 1971. Although he found a rather high rate of reversals (38 reversals to 98 affirmances between 1965 and 1971; 31 reversals to 87 affirmances between 1958 and 1964), Paper determined that in each reversal the Court was "guided by and . . . adhered to traditional principles of judicial review," and that "there [was] no sufficient factual basis to support the contention that the D.C. Circuit is usurping the regulatory power of the FCC."[30] Indeed, Paper contends with a note of sarcasm that

> any litigant who seeks affirmative relief from the court because of an adverse FCC decision faces a high risk of frustration. For, except in the most extreme circumstances, the court on review will only remand a case to the Commission so that it may reconsider its decision in proceedings 'not inconsistent with the court's opinion.' And, often, that remand generally will result in no more than a new rationalization for the Commission's first decision.[31]

Beizer and Quale, in a more detailed analysis of Court reviews of FCC decisions during 1972, found not a high reversal rate but rather a "near-unanimous affirmance rate" that suggested to them that the Court of Appeals, "far from exerting an intrusive influence on the Commission's conduct of its affairs, [had] instead confirmed the agency's broad discretion to set and administer policy in a variety of regulatory areas, . . ."[32] A study similar to the one conducted by Beizer and Quale was made of

FCC decisions reviewed by the Court of Appeals between January 1, 1964 and June 1, 1965. The study, conducted by Willis, found that the Commission had been reversed in twelve cases and affirmed in only eleven. Nine of the reversals occurred during a three month period in early 1965. Such a high reversal rate, however, did not prompt Willis to differ in any degree from what Beizer and Quale were to conclude later. In Willis' opinion his analysis of the reversals indicated that

> while the courts have been scrupulous in respecting the authority of the Commission to make the determinations which Congress has empowered it to make, they have also insisted that the Commission act only on the basis of an adequate record, that parties to the Commission be given a full and fair hearing (or at least a full opportunity to be heard on all relevant issues), and that the Commission adequately explain the reasons for its actions.
>
> Thus, although the Commission's determination of the public interest is virtually conclusive insofar as the merits of a particular matter are concerned, the courts assume a considerably broader authority to determine what the public interest requires where matters of procedure are involved.[33]

Taken from another perspective, a somewhat divergent view of the Court of Appeals' influence on the FCC begins to emerge. Former FCC Chairman Ford has spoken of a double-tier of Court influence: the indirect or inferential as well as the direct. Inferential influence is continuously exercised on the Commission's deliberations according to Ford.[34] Krasnow and Longley have elaborated on just how this influence is exercised:

> Judicial review . . . hangs as a threatening possibility over each administrative or legislative decision. Thus, potentially every action of the FCC may be reviewed by the courts. Although the courts ordinarily allow other arms of government . . . to make policy, the judiciary exercises a crucial veto power. Consequently, the FCC must always keep one eye on the courts to make sure that the policies it adopts can successfully run the judicial gauntlet. The continual threat of judicial review thus tends to have an impact on the policies of the FCC even when these policies are not formally adjudicated.[35]

As for the Court's direct influence, Chairman Ford in reviewing Commission decisions that were appealed to the Court under his chairmanship agrees with the

opinions thus far stated in this paper that "even where the court has seemed to disagree with the result reached, [the FCC's] decisions have, with few exceptions, been upheld on matters of substance."[36] In other words, the Court of Appeals had heeded the U.S. Supreme Court's binding dictim of finality that the court's "duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress."[37] On the other hand, Ford agrees with Willis' conclusion that "where the court was of the view that procedural error has occurred or that the state of the record before it was not satisfactory, it has been quick to remand."[38]

This matter of procedure or "due process" has emerged to join the "delegated authority" and "rationality of action" criteria as a third chief criterion for judicial review. Like the other two, "due process" has a firm foundation in the Administrative Procedure Act which reads, "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law."[39] Sections 553 through 558 of the APA outline in great detail just what procedures are to be followed by administrative agencies in the conduct of their rulemaking and adjudicative business.[40]

The presence of "due process" as a major criterion of judicial review could perhaps be characterized as a judicial "failsafe" used by the Court of Appeals to justify remanding a decision to an administrative agency whenever other criteria seem not to fit or whenever the expertise of the Court is clearly inadequate to properly rule one way or another on a decision for review. Woll has noted that

> the courts are more concerned with the procedural aspects of a case rather than the substantive aspects, which is simply because the former (points of law) are more within the range of judicial competence than the latter (policy questions and points of fact).[41]

Put another way, Chief Justice Bazelon of the D.C. Circuit Court of Appeals has said,

> When a judge's experience gives him a particular familiarity with an area, he--like any other human being--may develop views of proper policy. When a court thinks the administrative process has resulted in a clearly 'right' decision, the temptation is great not to waste time sending the case back to correct a minor procedural error. On the other hand, when the court does not feel comfortable trusting its own expertise with the subject matter, it is much more likely to insist on strict observance of procedural safeguards to fulfill its role of insuring proper administrative procedures.[42]

A recent case in which an FCC decision was reviewed and remanded to the Commission by the Court of Appeals may be cited here as an illustration of the emphasis the Court has come to place on procedure. In Home Box Office v. FCC,[43] the right of the Commission to limit the types of programming available to pay-cable and subscription television stations was challenged. In order to protect "free television" from losing certain sports and movie programming to pay television the FCC promulgated specific "anti-siphoning" rules in the early 1970's limiting pay systems to carrying those sports events and movies not generally carried by free television. The plaintiff in Home Box Office alleged that such rules were illegal. Upon review, the Court of Appeals agreed with the plaintiff, heavily weighting its decision on the "numerous ex parte contacts made between the parties to the rulemaking and various commissioners and commission employees." The Court explained its view of the procedural faultiness of ex parte contacts in these terms:

> Our fundamental notions of judicial review require that reviewing courts have access to 'the full administrative record' that was presumably before an agency when it exercised its discretion and promulgated rules. Where there have been frequent ex parte contacts, it is simply not possible to know the contents of the 'full administrative record.' Moreover, ex parte contacts violate fundamental notions of fairness implicit in due process.[44]

Fickle has studied in some detail the increasing willingness of the Court of Appeals "to assume a supervisory role over the process, as opposed to the product, of administrative decisionmaking." Fickle's analysis of several recent decisions has led him to conclude that the Court has begun demanding more precise and more

permanent standards of decisionmaking. Administrative agencies are finding themselves reversed by the Court whenever general policies have not be formulated, followed or otherwise properly applied in certain situations. In Fickle's words, "[T]here is an increasing tendency for the courts to insist that some policy determination be made, be publicly known, and be followed reasonably consistently by the agency." The Court has come to insist that administrative agencies adhere to such procedural standards as stare decisis or past precedent as a guide to deciding cases equitably, more "stringent hearing requirements" and "an adequate development of the administrative record." Whereas Fickle sees no problems with the Court's insistence on the latter two standards, he contends that the stare decisis standard cannot be justified so easily. Citing "impressive judicial precedent," Fickle says that "administrative authorities must be permitted, consistent with the obligation of due process, to adapt their rules and policies to the demands of changing circumstances."[45]

Thus far, the remarks in this paper have been predicated on the fact that the Court of Appeals exercises its power of judicial review according to expressly granted statutory provisions. Under the provisions of such statutes as the Communications Act and the Administrative Procedure Act standards and procedures of judicial review have evolved. But, what of the very basis of the constitutional concept of separation of powers? Certainly, as has been noted above, legal scholars have been able to find little support for the charge that the Court of Appeals has usurped the regulatory powers of an administrative body, namely the FCC. The same scholars have agreed that the Court has thus far been within its delegated legal bounds to correct the FCC by periodically reversing its decisions. Standards of judicial review have been developed and, as far as can be determined, have been legally applied by the Court to correct administrative improprieties. However, there are those who feel that any judicial review of an administrative decision abandons the limits of the judiciary established by the U.S. Constitution.

So that we might better perceive the problem raised by this issue and how the judiciary deals with it, we must first define the rulemaking and adjudicatory powers delegated to the FCC and examine their application. Simply stated,

> [R]ule-making is agency action regulating future conduct and is intended to implement and prescribe law or policy, while adjudication is intended to cover application of law and policy to past conduct or to licensing determinations.[46]

The dichotomy of purpose in the FCC's rulemaking and adjudicatory functions should be apparent; one is legislative, the other judicial. Former FCC General Counsel Ashton Hardy says that although the Court of Appeals certainly has the right to review disputed matters arising from the Commission's judicial (or quasi-judicial) function, the Court should not possess that same right to review disputed matters arising from the Commission's legislative (or quasi-legislative) function. He bases his conclusion on the premise of separation of power, which he says should apply to an administrative agency just as it would apply to the U.S. Supreme Court and the U.S. Congress. In simple terms, Hardy contends that any reversal by the Court of Appeals of a decision related to the FCC's rulemaking activity is clearly a breach of constitutional limitations. The only prerogative that the Court should exercise in reviewing matters of this kind, according to Hardy, is to remove itself from any judgmental considerations.[47]

Rejoinders to the preceding argument come from several sources. The first, from Kramer, partially agrees and partially disagrees with Hardy. Kramer describes agency rulemaking as consisting of two distinct categories:

> rules which fill in 'gaps' in a statute and which the statute expressly authorizes the agency to make, and rules which merely 'interpret' a statute and which are based solely upon the implied powers of the administrator.[48]

The precise language of the Communications Act leaves no doubt as to the intentions

of Congress toward the rulemaking role of the FCC. On the other hand, the vagueness of the "public interest" mandate embodied in the same Act leaves much latitude for agency interpretation. It is when the "public interest" principle has been invoked as a basis for rulemaking that Kramer contends the Court of Appeals is empowered to apply its own interpretation to the statute and to determine whether the FCC's interpretation is valid in relation to that of the Court's. According to Kramer, "This means that the court may, if it wishes, pass upon the wisdom of the [interpretative] rule and substitute its judgment for that of the agency."[49] The U.S. Supreme Court reiterates Kramer's statement in these words:

> Congress has charged the courts with the responsibility of saying whether the FCC has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.' It is our responsibility to say whether the commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear . . . in the public interest.[50]

D.C. Circuit Court of Appeals Judge Wright circumvents the matter of interpretation/counter-interpretation entirely by pragmatically suggesting why the Court may sometimes substitute its judgment for that of the FCC. Wright approaches the issue not on a philosophical basis but on the basis that an administrative agency is not and need not be treated as a legislative body whose lawmaking activities are constitutionally protected from judicial scrutiny. Citing two chief differences, Wright addresses himself to administrative agencies in general:

> Agencies . . . lack the direct, electorate-based responsiveness of legislatures and should be held to a higher standard of procedural scruple to ensure their work is done fairly and carefully. A related point is that agencies, because of their lower visibility and specialized jurisdictions, seem more likely than legislatures to be captured by the interests they spend their time analyzing and regulating.[51]

FCC Decisionmaking Deficiencies and Alternate Review Structures

Judge Wright's observation raises a very core issue, that of the FCC's

deficiencies in performing its assigned rulemaking/adjudicatory tasks. Since the rationale of the foregoing leads us to conclude that the Court of Appeals is indeed justified in acting as it sometimes does to legally substitute its views for those of the FCC, we might inquire as to why the frequent reversals documented elsewhere in this paper have become so necessary.

Studies conducted to examine administrative agency's rulemaking and adjudicative conduct provide some of the answers. Almost twenty years ago, a Senate judiciary subcommittee concluded that "a record of 'inaction, endless delays, favoritism and arbitrary actions' by [agency] commissioners created 'a wide-spread lack of public confidence in the fairness of agency decisions.'"[52] More recently a House subcommittee reached similar conclusions while focusing on the FCC specifically. The Subcommittee on Oversight and Investigations isolated the following "principal handicaps" of Commission decisionmaking:

> (1) insufficient public representation to offset the assiduous attention paid by commercial interests, (2) failure to anticipate or keep pace with technical and commercial developments in communications, (3) a deficiency of technical expertise for analysis of complex issues resulting in failure to develop facts basic to regulation of the broadcasting and telephone industries, and (4) inertial acceptance of prevailing patterns.[53]

A 1975 study by the Committee for Economic Development concerned itself not so much with the effects but with the causes of the FCC's decisionmaking deficiencies. The CED listed such causes as "the increasing scope, complexity, and detail of broadcast regulation and the lack of time, staff, and budget to create and execute sound, forward-looking policy."[54]

All of this leads us to ask whether the administrative/judicial relationship that now exists between the FCC and the Court of Appeals might better be served by alternative structures?

The "performance deficiencies" described above are, in most instances, products

of "structural deficiencies" inherent in the FCC's operational mechanisms. It is through alteration of these mechanisms that the Commission might improve its ability to make rules and to adjudicate controversies while at the same time diminishing the likelihood of Court review of its decisions.

A number of structural alterations have been recommended through the years that possibly could have improved the FCC's decisionmaking capabilities had they been adopted. Most recently, the staff of the House Communications Subcommittee has reviewed those past recommendations and has added some of its own while compiling data for rewriting the Communications Act. The following items summarize a portion of the staff's recommendations:

> 1) Eliminate the FCC's Review Board as an "intermediate appellate body" responsible for handling "exceptions to initial decisions of Administrative Law Judges."
>
> 2) Consolidate the hearing functions of each separate Commission Bureau (Broadcast, Cable, Common Carrier and Safety and Special Services) into one hearing division under the Office of the General Counsel.
>
> 3) "Amend the [Communications] Act to require that nominees to the FCC shall be qualified by reason of training, education or experience to carry out the functions of the Commission." Also, "amend the Act to require the President, in nominating persons for the FCC, to insure that the FCC membership be balanced with broad representation of various talents, backgrounds, occupations and experience appropriate to the functions and responsibilities of the Commission."
>
> 4) Increase each FCC Commissioner's personal advisory staff to include expertise in key decisionmaking areas.
>
> 5) Limit post-FCC employment so as to restrict Commissioners and staff from entering jobs in the very industries they formerly regulated.
>
> 6) Streamline rulemaking and adjudicative procedures in general.[55]

The Subcommittee staff has also recommended creation of an administrative court.[56] This is not a new idea but rather one that is as old as the FCC itself. A number of major studies from the 1934 American Bar Association Proposal to the 1971 President's Advisory Council on Executive Organization (the Ash Council) have

made recommendations for creating some form of administrative court. Several major bills have also been introduced before Congress attempting to implement creation of an administrative court but to no avail.[57]

The concept of an administrative court consists of two basic variations. One views the court as a part of the FCC. As such, the Commission would retain its rulemaking functions while relinquishing its adjudicatory functions to the new "communications court." FCC Commissioners thus would be freed of their adjudicatory burden while at the same time they would be allowed more time to devote to rulemaking and establishing meaningful communications policy. What is more important, the communications court would rid the Commission of the "conflicts that inevitably arise when it must enforce the rules it has instituted."[58]

The second variation of administrative court would have it on the same appellate level as the current Court of Appeals, but the new court would assume the latter's role of reviewing administrative agency decisions. Adjudicatory responsibilities would be retained by the FCC. An administrative court of this design would benefit the review process by relieving the Court of Appeals of its heavy caseload, by reviewing cases and arriving at decisions on a more timely basis and by adding a greater degree of understanding to the sophisticated, complex issues that often confront the Court in reviewing telecommunications industry cases.[59]

Conclusion

It is obvious that the FCC with its delicate executive-legislative-judicial division of authority is in a vulnerable position whenever its decisions are reviewed. But, as we have already determined, there is no reason to believe that the Court of Appeals has ever taken advantage of this vulnerability. The vague "public interest" mandate of the Communications Act often has been criticized for the imprecision of congressional intent it symbolizes. However, we view its incorporation into the Act

as an effort to insure that every manner of interpreting the "public interest" be carefully weighed. Implicit in this is the fact that Congress has never attempted to alter the relationship between the FCC and the Court of Appeals by diminishing the power of the Court to offer its interpretation of the "public interest" for that of the Commission's. Indeed, as indicated by passage of the 1946 Administrative Procedure Act, Congress was and is cognizant of the failures of administrative agencies like the FCC always to apply expert judgment to policymaking decisions. Court of Appeals review of these decisions has provided Congress with the assurance that reasonable, if not expert judgment will prevail.

NOTES

[1]Louis L. Jaffe, "The Right to Judicial Review I," Harvard Law Review, 71:401 (January, 1958).

[2]47 U.S.C. 402(b) and (j)(1970).

[3]Robert A Beizer and John C. Quale, "Judicial Review of FCC Decisions: 1972," Federal Communications Bar Journal, 25:251 (1972).

[4]"Who's in charge here," Broadcasting, 92 (April 4, 1977), p. 106.

[5]Lewis J. Paper, "Judicial Scrutiny of the FCC: The Illusion of Usurpation," Boston University Law Review, 52:660-661 (Fall, 1972).

[6]Kenneth Culp Davis, Administrative Law (St. Paul, Minn.: West Publishing Co., 1977), p. 1.

[7]5 U.S.C. 706(2)(1970).

[8]Henry Geller, "Communications Law," The Georgetown Law Review, 63:39 (October, 1974).

[9]44 Stat. 1169 (1927).

[10]Ibid.

[11]Bethuel M. Webster Jr., "The Power of the Court of Appeals, D.C., to Review Decisions of the Federal Radio Commission," Air Law Review, 1:418 (July, 1930).

[12]Davis, op. cit., p. 57.

[13]Harry P. Warner, "Subjective Judicial Review of the Federal Communications Commission," Michigan Law Review, 38:636-639 (March, 1940).

[14]Don R. LeDuc and Thomas A. McCain, "The Federal Radio Commission in Federal Court: Origins of Broadcast Regulatory Doctrines," Journal of Broadcasting, 14:394 (Fall, 1970).

[15]Bernstein has divided the life cycle of administrative agencies into four periods. The 1927-1934 FRC era described by LeDuc/McCain falls into the second or "youth" stage of the four periods. Bernstein says the following about the "youth" stage:

> When a regulatory commission is established, its real and potential capacities contrast sharply with those of the regulated groups. It lacks administrative experience, its policy and objectives are vague or unformed, its legal powers are unclear and untested, . . .
>
> The regulatory commission soon discovers that it can accomplish little until the Supreme Court has passed on the validity and constitutionality of its powers and authority. Immediately the scene of battle changes to the courtroom. Litigation forms the framework for the regulatory process

until the courts have issued an authoritative decision or series of decisions outlining the legal scope of regulatory powers.

Marver H. Bernstein, "The Life Cycle of Regulatory Commissions," in The Politics of Regulation, edt. Samuel Krislov and Lloyd D. Musolf (Boston: Houghton-Mifflin Co., 1964), pp. 80-82.

[16]Walter B. Emory, Broadcasting and Government: Responsibilities and Regulations (East Lansing, Mich.: Michigan State University Press, 1971), p. 30.

[17]47 U.S.C. 154(i)(1970).

[18]47 U.S.C. 303(1970).

[19]Ralph F. Fuchs, "The Hearing Officer Problem--Symptom and Symbol," Cornell Law Quarterly, 40:282 (Winter, 1955).

[20]Greater Boston Television Corp. v. FCC. 444 F. 2d 841, at 851-852 (1970).

[21]Fannie J. Klein, Federal and State Court Systems--A Guide (Cambridge, Mass.: Ballinger Publishing Co., 1977), p. 172.

[22]Ibid., pp. 173-174.

[23]Robert Kramer, "The Place and Function of Judicial Review in the Administrative Process," Fordham Law Review, 28:9 (Spring, 1959).

[24]Paper, op. cit., p. 667.

[25]Ibid., p. 665.

[26]Ibid., p. 666.

[27]FCC v. RCA Communications, Inc. 346 U.S. 86, at 91 (1953).

[28]Paper, op. cit., pp. 665-666.

[29]Greater Boston Television Corp. v. FCC. 444 F. 2d 841, at 851 (1970).

[30]Paper, op. cit., pp. 659-660.

[31]Ibid., 688.

[32]Beizer and Quale, op. cit., pp. 251-252.

[33]John W. Willis, "Cases and Comments: Judicial Review of FCC Decisions, 1964-1965," Federal Communications Bar Journal, 19:49-50 (1965).

[34]Fredrick W. Ford, "The Impact of Judicial Review on the Federal Communications Commission," West Virginia Law Review, 63:25 (December, 1960).

[35]Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1973), p. 42.

[36]Ford, op. cit., p. 33.

[37]National Broadcasting Co. v. United States, 319 U.S. 190, at 224 (1942).

[38]Ford, loc. cit.

[39]5 U.S.C. 706(2)(D)(1970).

[40]5 U.S.C. 553-558(1970).

[41]Peter Woll, American Bureaucracy (New York: W.W. Norton & Co., 1963), p. 108.

[42]Judge David R. Bazelon, "The Impact of the Courts on Public Administration," Indiana Law Journal, 52:104 (Fall, 1976).

[43]Home Box Office, Inc. v. Federal Communications Commission, slip case, No. 75-1280, et al., Decided on March 25, 1977, U.S. Court of Appeals, D.C. Circuit.

[44]Ibid.,Syllabus, pp. i-vi.

[45]Stanley C. Fickle, "Recent Changes in the Scope of Judicial Control Over Administrative Methods of Decisionmaking," Indiana Law Journal, 49:118-146 (Fall, 1973).

[46]Warren E. Baker, "Policy By Rule or Ad Hoc Approach--Which Should It Be?" Law and Contemporary Problems, 22:658 (Autumn, 1957).

[47]Ashton Hardy, personal interview with author, New Orleans, La., November 4, 1977.

[48]Kramer, op. cit., pp. 87-88.

[49]Ibid., p. 89.

[50]Steve Millard, "Broadcasting's Pre-Emptive Court," Broadcasting, 81 (August 30, 1971), pp. 17-18.

[51]Judge J. Skelly Wright, "Court of Appeals Review of Federal Regulatory Agency Rulemaking," Administrative Law Review, 26:204 (Spring, 1974).

[52]Alan F. Westin, "Inquiry into Our Watchdog Agencies," in Krislov, op. cit., p. 13.

[53]U.S. Congress. Federal Regulation and Regulatory Reform. Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives, 94th Congress, 2nd Session, 1976 (Subcommittee Print), p. 246.

[54]Committee for Economic Development, Broadcasting and Cable Television (New York: Committee for Economic Development, 1975), p. 82.

[55]Toby Harder, "Structural and Procedural Options for Regulation of Telecommunications," in U.S. Congress. Options Papers. Staff Report for Use by the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Congress, 1st Session, 1977 (Committee Print 95-13), pp. 617-659.

[56]Ibid., p. 626.

[57]The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies, (Washington, D.C.: U.S. Government Printing Office, 1971), pp. 140-144.

[58]Committee for Economic Development, loc. cit.

[59]The President's Advisory Council on Executive Organization, op. cit., p. 48.